

A Tan Poh Lee & Ors v Tan Kim Choo @ Tan Kim Choon & Anor

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO
W-02(NCVC)(A)-133-01 OF 2017
ROHANA YUSUF, VERNON ONG AND HASNAH HASHIM JJCA
13 JULY 2018

C *Mental Disorders and Treatment — Inquiry — Whether person was of unsound mind and incapable of managing his affairs — Application to court for order under s 52 of the Mental Health Act 2001 for inquiry to be conducted to determine person's mental condition — Whether prima facie case that person was mentally disordered had to be established before court could order an inquiry under s 52*
D *— Whether court should not, on finding prima facie case established, determine the application summarily by considering rebuttal evidence — Whether any rebuttal evidence should only be considered after the inquiry was held and when the court had to consider whether or not to make orders to administer the affairs of the person examined*

E The first respondent ('R1'), who held directorships and shareholdings in various companies and was the signatory to operate the bank accounts of those companies, suffered a major stroke that allegedly left him incapable of managing his affairs. At all material times, R1 stayed with his son, the second respondent ('R2'). The three appellants were R2's sisters. Concerned over their father's condition, the appellants informed R2 of their intention to appoint a committee of persons to administer R1's estate and interests with the inclusion of themselves and R2 in the committee. When R2 rejected the idea, the appellants applied to the High Court under s 52 of the Mental Health Act 2001 ('the MHA') for an inquiry to be ordered into R1's mental condition to determine whether or not he was capable of managing himself and his affairs. The appellants also sought an order for a committee to be set up to manage R1's affairs and estate. The appellants claimed that because R2 denied them access to their father, they could not produce latest medical reports on his condition.
F
G
H Based on the evidence adduced by the appellants, the High Court found that there was a prima facie case warranting an order for an inquiry under s 52 to be made. However, the judge thereafter considered a rebuttal affidavit filed by R2 containing more recent medical reports on R1 which showed that he was capable of managing his own affairs. The judge preferred to accept R2's medical reports over the evidence adduced by the appellants and dismissed their application. The instant appeal was against the High Court's decision.
I

Held, unanimously allowing the appeal, setting aside the High Court's order and ordering the High Court to hear the appellants' application on its merits:

- (1) An application made pursuant to s 52 of the MHA involved a two-tier process. First, the applicant had to establish a prima facie case before an inquiry under s 52 could be ordered. In determining whether there was a prima facie case, the Court had to ascertain whether there was substance to substantiate the allegation that a person was mentally disordered. At that stage, it was not required to be conclusive proven that a person was mentally disordered (see paras 15–16). A B
- (2) Having found that the appellants had established a prima facie case, the High Court judge fell into error by proceeding to analyse the appellants' case like it was a full hearing on merits and concluding that the prima facie case had been rebutted by the medical reports produced by R2. It had to be noted that the appellants complained that they could not produce latest medical reports on R1 because they were denied access to him. On finding that a prima facie case had been established, the judge should have ordered an inquiry to be conducted under the MHA. The inquiry was the next step before any order to administer the affairs of R1 was made or otherwise. By treating the application for leave as if it was a full hearing on its merits and by deciding the case summarily, the judge had short-circuited the procedure contained in s 52 of the MHA and had denied the remedy to the appellants summarily (see paras 18–21). C D E
- (3) On finding that the appellants had established a prima facie case, the judge should at that point have considered whether to proceed with the inquiry without considering the rebuttal evidence. The rebuttal evidence was only to be considered at the next stage, after the inquiry, when the judge had to consider whether to make the orders to administer the affairs of R1 (see para 21). F

[Bahasa Malaysia summary]

Responden pertama ('R1'), yang memegang jawatan pengarah dan pegangan saham dalam pelbagai syarikat dan merupakan penandatangan untuk mengendalikan akaun-akaun bank untuk syarikat-syarikat tersebut, telah mengalami strok teruk yang dikatakan telah menyebabkan dia tidak berupaya untuk mengurus hal ehwalnya. Pada setiap masa matan, R1 tinggal bersama anak lelakinya, responden kedua ('R2'). Ketiga-tiga perayu adalah adik-beradik perempuan R2. Bimbang tentang keadaan bapa mereka, perayu-perayu telah memberitahu R2 berhubung niat mereka untuk melantik satu jawatankuasa orang-orang untuk mentadbir harta dan kepentingan R1 termasuklah mereka sendiri dan R2 dalam jawatankuasa itu. Apabila R2 menolak idea itu, perayu-perayu telah memohon kepada Mahkamah Tinggi di bawah s 52 Akta Kesihatan Mental 2001 ('AKM') untuk suatu siasatan diperintahkan ke atas keadaan mental R1 bagi menentukan sama ada atau tidak dia berupaya untuk menguruskan dirinya sendiri dan hal ehwalnya. Perayu-perayu juga memohon perintah untuk satu jawatankuasa ditubuhkan untuk menguruskan hal ehwal dan harta R1. Perayu-perayu mendakwa G H I

- A bahawa oleh kerana R2 menafikan akses kepada bapa mereka, mereka tidak boleh mengemukakan laporan-laporan perubatan terkini tentang keadaannya. Berdasarkan keterangan yang dikemukakan oleh perayu-perayu, Mahkamah Tinggi mendapati bahawa terdapat kes prima facie yang mewajarkan suatu perintah untuk suatu siasatan di bawah s 52 dibuat. Walau bagaimanapun, B hakim selepas itu telah mempertimbangkan affidavit bantahan yang difailkan oleh R2 yang mengandungi lebih laporan-laporan perubatan terkini yang menunjukkan bahawa dia berupaya untuk menguruskan hal ehwalnya sendiri. Hakim memilih untuk menerima laporan-laporan perubatan R2 ke atas keterangan yang dikemukakan oleh perayu-perayu dan menolak permohonan mereka. Rayuan ini adalah terhadap keputusan Mahkamah Tinggi. C

Diputuskan, sebulat suara membenarkan rayuan, mengetepikan perintah Mahkamah Tinggi dan memerintahkan Mahkamah Tinggi mendengar permohonan perayu atas meritnya:

- D (1) Suatu permohonan yang dibuat menurut s 52 AKM melibatkan proses dua peringkat. Pertama, pemohon perlu membuktikan kes prima facie sebelum siasatan di bawah s 52 boleh diperintahkan. Dalam menentukan sama ada terdapat kes prima facie, mahkamah perlu menentukan sama ada terdapat substans untuk menyokong dakwaan bahawa seseorang itu mengalami gangguan mental. Di peringkat tersebut, ia tidak perlu dibuktikan secara konklusif bahawa seseorang itu mengalami gangguan mental (lihat perenggan 15–16). E
- F (2) Setelah mendapati bahawa perayu-perayu telah membuktikan kes prima facie, hakim Mahkamah Tinggi telah terkhilaf dengan meneruskan untuk menganalisa kes perayu-perayu seperti ia adalah perbicaraan penuh atas merit dan membuat kesimpulan bahawa kes prima facie telah dipatahkan oleh laporan-laporan perubatan yang dikemukakan oleh R12. Ia perlu diambil kira bahawa perayu-perayu mengadu bahawa mereka tidak boleh mengemukakan laporan-laporan perubatan terkini berhubung R1 kerana mereka dinafikan akses kepadanya. Atas dapatan bahawa satu kes prima facie telah dibuktikan, hakim sepatutnya telah memerintahkan siasatan dijalankan di bawah AKM. Siasatan tersebut adalah langkah seterusnya sebelum apa-apa perintah untuk mentadbir hal ehwal R1 dibuat atau sebaliknya. Dengan menganggap permohonan untuk kebenaran seperti ia adalah perbicaraan penuh atas meritnya dan dengan memutuskan kes secara terus, hakim telah memendekkan prosedur yang terkandung dalam s 52 AKM dan telah menafikan remedi kepada perayu-perayu secara terus (lihat perenggan 18–21). G
- H I (3) Atas dapatan bahawa perayu-perayu telah membuktikan kes prima facie, hakim sepatutnya pada peringkat itu mempertimbangkan sama ada untuk meneruskan dengan siasatan tanpa mengambil kira keterangan bantahan. Keterangan bantahan itu hanya diambil kira di peringkat

seterusnya, selepas siasatan, apabila hakim telah mempertimbangkan sama ada untuk membuat perintah-perintah bagi mentadbir hal ehwal R1 (lihat perenggan 21).]

A

Notes

For cases on inquiry in general, see 10(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 469–473.

B

Cases referred to

Gary Lim Ting Howe v Lim Pang Cheong [2015] MLJU 832; [2015] 9 CLJ 227, HC (distd)

C

George John v Goh Eng Wah Bros Filem Sdn Bhd & 2 Ors [1988] 1 MLJ 319 (folld)

Muhammad Yaqud v Nazir Ahmad & Ors Allahabad 1920 Vol xlii 504, HC (refd)

D

Wong Kim v Loh Kim Foh [2003] 4 MLJ 535, HC (folld)

Legislation referred to

Mental Disorders Ordinance 1952 (repealed by the Mental Health Act 2001) s 3

E

Mental Health Act 2001 ss 2, 52, 53(3)

Appeal from: Originating Summons No WA-24NCVC-137–01 of 2016 (High Court, Kuala Lumpur)

F

Liam Kian Leong (Ng Thiang Tuan, Keith Kwan Tjee Kin and Rachel Marynne Verghis with him) (Tuan, Mohd Zain & Co) for the appellants.

Azinuddin Karim (J Nee) for the first respondent.

Malik Imtiaz (K Shanmuga, Jonas Lee and Priscilla Chin with him) (Kanesalingam & Co) for the second respondent.

G

Rohana Yusuf JCA (delivering judgment of the court):

[1] This appeal is lodged by the plaintiffs against the decision of the learned High Court judge who had dismissed the plaintiffs' originating summons ('OS') for an inquiry against their father under s 52 of the Mental Health Act 2001 ('the MHA'). We have allowed the appeal and remitted the case to the High Court at Kuala Lumpur for an inquiry to be conducted by the learned High Court judge, under s 52 of the MHA.

H

I

[2] The plaintiffs are the three daughters of Tan Kim Choo @ Tan Kim Choon, the first defendant. The second defendant is the brother of the plaintiffs with whom their father, the first defendant was residing with at the material time. The first defendant had suffered from a massive stroke on or

A about 3 August 2015, which affected two-thirds of the right hemisphere of the brain.

B [3] The first defendant was in the Gleneagles Hospital and was discharged on or about 11 September 2015. He was then transferred to Tung Shin Hospital on 14 September 2015 for continued treatment. He was referred to a consultant psychiatrist for psychological assessment. The medical report by the consultant psychiatrist of Tung Shin Hospital, Dr Francis Low Chee Chan dated 14 November 2015 in exh TPL5 indicated that the first defendant might have vascular dementia and he would not be suitable to resume his duties in his work. A medical report of about three months later dated 2 September 2015 by Dr Mak Choon Soon, a consultant neurologist at Gleneagles Hospital opined that the first defendant was having difficulties in speech and swallowing, weakness on the left side; had communication problem, and required care and assistance in all his daily activities.

D [4] Before the incident, the first defendant was holding the posts and owned shares in the following companies:

- E (a) Chairman and Managing Director in Tan Kim Choo Holdings Sdn Bhd ('TKC') and a shareholder of 40%;
- (b) Chairman and Managing Director of Fair Park Hotel Sdn Bhd ('Fair Park Hotel') and a shareholder of 90%;
- F (c) Managing Director in Cairnhill Hotel (M) Sdn Bhd ('Cairnhill Hotel (M)') and a shareholder of 50%;
- (d) Director in Strategy Guide Sdn Bhd and a shareholder of 70%;
- (e) Director in Hotel Cairnhill Sdn Bhd and a shareholder of 50%;
- G (f) Director in Median Vision Sdn Bhd and a shareholder of 0.000016% shares;
- (g) Director in Far East Brickworks Sdn Bhd (in liquidation) ('Far East Brickworks') and a shareholder of 9.09%;
- H (h) a shareholder of 5.56% in Thai Huat Brickworks Sdn Bhd; and
- (i) a shareholder of 50% shares in Genting Enterprise (see exh TPL6 *rekod rayuan* (Jld 3A) (*Bahagian C*) at pp 592–643).

I [5] The plaintiffs through the affidavit affirmed by the first plaintiff on behalf of the other plaintiffs, averred that the first defendant who has been authorised to act as signatory to a number of companies' bank accounts could no longer resume his duty as signatory. The first defendant personally, and together with other shareholders also owned immovable properties and money in the bank accounts as stated in exh TPL7. The immovable properties owned

by the first defendant are as in exh TPL8. The said properties were rented out, as stated in exh TPL9 (see *rekod rayuan (Jld 3A) (Bahagian C)*). The first defendant is also subject to personal income tax liability and has the duty to settle his personal income tax as a tax payer.

[6] The plaintiffs vide a solicitor's letter dated 3 November 2015 informed the second defendant of their intention to appoint a committee of persons to administer the estate and interest of their father. The plaintiffs proposed the participation of the second defendant as a member of the proposed committee together with them. The second defendant however disagreed. By a letter from his solicitors of 17 November 2015, the second defendant took the position that the medical impairment suffered by their father is not occasioned by any mental disorder as defined under s 2 of the MHA and the status quo is to be maintained.

[7] The opposition of the second defendant led to the application of the plaintiffs by way of OS dated 22 January 2016 at the High Court Kuala Lumpur. The OS by the plaintiffs was made pursuant to s 52 of the MHA. It sought for an inquiry into the mental condition of their father in order to determine whether the father is capable of managing himself and his affairs. The plaintiffs also prayed for an order that a committee be set up if there is a need to manage his affairs and the estate. The proposed members of the committee are Mr Bala Krishnan a/l Ponniah, Mr Tan Kim Lim @ Tan Kim Leng and Dr Stephen Thevananthan a/l Jambunathan who the plaintiffs opined to be the most suitable persons.

[8] In the affidavit in support averred by the first plaintiff, it was also contended that they are relatives as defined in s 53(3) read with s 2 of the MHA and have the necessary locus standi to make the application.

[9] The learned High Court judge had summarised the grounds of the application of the plaintiffs at para 7 of the grounds of judgment as below:

- (a) their father is a mentally disordered person under s 2 of the MHA and is incapable of managing himself and his affairs that warrant an inquiry under s 52 of the MHA;
- (b) they also have the support of their father's private caregiver, employed by their brother and his wife. This caregiver had sworn an affidavit to the effect that their father was to be taken away from Tung Shin Hospital and she was instructed by the son to brainwash their father to dislike the daughters. She also affirmed she had persuaded the father to sign some documents upon the instruction of the son. She was also asked by the son to coach the father in saying certain things before the psychiatrist and lawyers before he was taken to see them. The same thing is required of her

- A** when the father was taken to the police station. The caregiver also affirmed that she believes the father is unable to take care of himself and to make any decision on his own;
- B** (c) the medical specialists and their father's caregiver evidence shows that they have a prima facie case that their father is of unsound mind and incapable of managing himself and his affairs;
- (d) this court also has the power even to have the father being personally examined;
- C** (e) what the daughters need to show at this stage is merely a legitimate and arguable case as a definitive finding on the state of the mind of the father can only be done in due course at the inquiry itself and not now;
- (f) their father has been taken out from the hospital and no access had been given to them by their brother. There is a need to know the mental state of their father as there is no certainty that continuous care, treatment, rehabilitation and protection are given to him;
- D** (g) their father had been cut off by their brother from medical experts who had good knowledge on the health history and mental condition of their father;
- E** (h) their father had not resume duties as directors and shareholders in a few companies. There is a possibility this could be because of the mental condition of their father;
- F** (i) in commencing the OS, the daughters have only the interest of their father in their mind and the OS is not in any way prejudicial to their father; and
- (j) the daughters could not have a mala fide contention in pursuing the OS merely to take control of their father's assets as they had invited their brother to jointly apply for the OS and as their brother rejected the invitation to be a member of a committee looking after their father, the daughters have no option but to file the same.
- G**
- H** [10] In resisting the application the first defendant did not affirm any affidavit in reply. The second defendant in his affidavit in reply denied the physical and mental state of the father as alleged by the sisters, and contended, (as summed up by the learned judge) that:
- I** (a) the medical reports relied by his daughters are not contemporaneous documents and do not reflect his present mental condition. He is on the contrary capable of managing his own affairs;
- (b) there must be a prima facie case against him that he is of unsound mind and incapable of managing himself. If there is no prima facie case, there can be no order for an inquiry;

(c) the first defendant has lodged a police report that he does not want to see his daughters anymore. He has affirmed a statutory declaration that he is dissatisfied by the action of his daughters and prefers now to let his son to take care of him; and A

(d) he does not recall being examined by the medical specialist cited by his daughters. B

[11] The High Court dismissed the plaintiffs' OS as it was found that there were conflicting medical reports between the ones produced by the plaintiffs with those by the defendants. As a result, the learned judge proceeded to rule that the medical reports in favour of the father should be accepted. In this regard, the trial judge held the view that His Lordship as a trial judge, would always be at liberty with a choice of which medical view prevails. The position taken by the defendants was given recognition by the learned judge as it was supported by more recent medical reports. C D

[12] On the allegation by caregivers that the second defendant's savoury action against the father, which would drive a point that he was mentally not capable, the learned judge ruled that it should be weighed against the positive medical report favouring the father. E

[13] In the grounds of judgment the learned trial judge accepted the plaintiffs' contention that the degree or standard required in the application is a prima facie case test. The learned judge then quoted the explanation made by Abdull Hamid Embong J (as he then was) in *Wong Kim v Loh Kim Foh* [2003] 4 MLJ 535, where it was observed that: F

... In deciding on this process I had been referred to and follow a number of Indian authorities in particular *Muhammad Yaqub v Nazir Ahmad & Ors* which decided that the purpose of such a preliminary enquiry was for the judge to satisfy himself that there is a real ground for an inquisition. *At this preliminary stage, the judge should be satisfied that there is some prima facie evidence to establish that the subject is a person of unsound mind and incapable managing himself and his affairs.* G

An order directing an inquiry into a person's state of mind is a very serious matter and is intended to be a judicial determination made only upon satisfaction by the judge of its necessity based on adequate material. For this reason, a two-tier inquiry has been preferred under the Indian Lunacy Act 1972, the earlier or preliminary enquiry with a purposed of determining a prima facie for the inquisition order to be made under s 3 of the MDO. (Emphasis added.) H

[14] The learned judge then held that at this stage of the application, the plaintiffs were in fact seeking for leave for an inquiry, which was the first step of the two-tier process. The plaintiffs in the OS had therefore first of all to establish a prima facie case. I

A [15] We are in agreement with the legal position as stated by the learned trial
judge that a prima facie case has first to be established in an application made
pursuant to s 52 which requires a two-tier process. First the applicant has to
B establish a prima facie case before any inquiry under s 52 should be conducted
by the court. This was indeed the legal position held in *Wong Kim v Loh Kim*
Foh of which we agreed. In that case an application was made pursuant to s 3 of
the Mental Disorders Ordinance 1952, which contained similar provisions as
s 52 of the MHA. The learned judge there, was guided by the decision of an
C Indian High Court case of *Muhammad Yaqud v Nazir Ahmad & Ors Allahabad*
1920 Vol xlii 504.

D [16] From the above cited authorities, it is clear that the application of the
plaintiffs must therefore be examined by conducting a two-tier process. At the
first stage, the plaintiffs have to establish a prima facie case. In determining
whether there was a prima facie case, the learned judge rightly held that there
must be allegation that a person is mentally disordered in the application for
inquiry and the court has a duty to determine whether the allegation is
potentially true. The learned judge then proceeded to maintain his position
that it cannot be simply a case that, once the allegation is made, the inquiry is
E ordered at once. Otherwise according to the trial judge, it would be far too easy
for anyone to request for an inquiry just by asserting that a person is mentally
disordered. We are in agreement with the learned judge that, at this stage the
court should ascertain whether there is substance to substantiate the allegation
in the first place. The question then is what is the degree or standard that is
F required of the plaintiffs at this stage, in proving the allegation that a person is
mentally disordered? The learned judge accepted the contention that the
degree or standard required is only a prima facie case. Thus at the stage where
the application is filed, it does not require that a person is conclusively proven
to be mentally disordered. We have no difficulty in accepting the above legal
G position and the step undertaken by the learned trial judge, thus far.

H [17] The learned judge then explained what a prima facie case was. In his
judgment at para 11, he quoted Ananda Krishnan *Words, Phrases & Maxims*
(*Legally & Judicially Defined*) where the learned author defines a prima facie
case to mean evidence which suffices for the proof of a particular fact untill
contradicted and overcome by other evidence. Learned author had referred to
Sarkar on Evidence where 'prima facie evidence' is defined as evidence which, if
accepted appears to be sufficient to establish a fact, unless rebutted by
I acceptable evidence to the contrary.

[18] Having stated the legal position the learned judge then found a prima
facie case established by the plaintiffs. This is clearly stated in para 24 of the
judgment. In our view the learned judge however had fallen into error to have
proceeded to analyse the plaintiffs' case like a full hearing on merits. Having

found a prima facie case established he concluded that the prima facie case had been rebutted by the medical reports produced by the defendants.

A

[19] If the learned judge had employed a two-tier approach, then what should have been done was to order for the inquiry to be conducted under the MHA once a prima facie case was established by the plaintiffs. The inquiry would be the next step, before any order to administer the affairs of the first defendant is to be made or otherwise. By deciding upon the case summarily in our view the learned judge had short circuited the procedure embedded in s 52 of the MHA and had denied the remedy to the plaintiffs summarily.

B

C

[20] We therefore agree with the plaintiffs that the learned judge had erred in the approach taken by summarily disposing the application when a prima facie case as found by him had already been established by the plaintiffs. However, the learned judge then fell into serious error by treating the application for leave as if it was a full hearing on its merits.

D

[21] It is implicit in para 24 of the grounds of judgment that the learned judge also agreed that the plaintiffs had in fact satisfied the prima facie test. Once a prima facie case had been established, the learned judge should at that point consider whether to proceed with the inquiry without consideration of the rebuttal evidence as yet. The rebuttal evidence should only be considered at the next stage after the inquiry, when the learned judge had to consider whether to make the orders to administer the affairs of the first defendant. It is pertinent to note that the complaint raised by the plaintiffs that they have no access to their father would make it impossible for them to produce current medical report on him.

E

F

[22] At this juncture, it is also imperative to note the case of *Gary Lim Ting Howe v Lim Pang Cheong* [2015] MLJU 832; [2015] 9 CLJ 227 that was relied upon by the learned judge. The case dealt with the issue of the setting aside of an order made under the MHA, and does not concern with the 'prima facie test' as elucidated herein. We would refer to *George John v Goh Eng Wah Bros Filem Sdn Bhd & 2 Ors* [1988] 1 MLJ 319, where the late Lim Beng Choon J, with whom we agree, described in crisp language the approach the court should take, at leave stage. In that case he observed that:

G

H

At the outset, it is very significant to take note that the application in the instant proceeding is not one for an order of certiorari but rather for leave to apply for such an order. *On principle and authority, I am of the view that at this stage of the proceeding, the court is required only to inquire whether the matter to be decided by the court is not in act frivolous and vexatious* in the sense that it is a trivial complaint of an administrative error by a busybody with a misguided sentiment and misconception of the law. *Another requirement at this stage of the proceeding which a court has to consider is that the applicant must produce sufficient evidence to sustain a*

I

- A *prima facie case* that a public officer or authority that made the decision had acted unlawfully or that he or it had in its exercise of the administrative discretion acted ultra vires the power given to him or it under the relevant statute. If the court is satisfied that the applicant has complied with these two requirements, leave would usually be granted irrespective of whether the applicant has suffered no greater injury than thousands of the King's subjects ... (Emphasis added.)
- B

- [23] For all the reasons stated above we are unanimous in our decision that the learned trial judge had erred in dismissing the OS summarily despite a *prima facie case* been established. We therefore allowed the appeal with no order as to costs. Following that, we set aside the order of the learned judge and remitted back the OS to the High Court at Kuala Lumpur to be heard on its merits.
- C

- Appeal allowed; High Court's order set aside and High Court ordered to hear appellants' application on its merits.*
- D

Reported by Ashok Kumar

E

F

G

H

I